Editor's note: 77 I.D. 166

BEARD OIL COMPANY

IBLA 70-19 Decided October 7, 1970

Accounts: Refunds -- Oil and Gas Leases: Rentals

Where a noncompetitive oil and gas lease is cancelled as having been erroneously issued in derogation of the rights of prior qualified applicants, this Department will order that a refund of the rentals paid for the lease be made to the lessee upon his application for repayment if the cancellation is in no way due to any fault of the lessee and provided there is no arrangement or agreement between lessee and other parties and there is no evidence of fraud or collusion.

L. N. Hagood, et al., 65 I.D. 405 (1958) is overruled.

1 IBLA 42

IBLA 70-19 : BLM-A 059146

BEARD OIL COMPANY	:	Oil and gas lease cancelled, refund of rentals refused
	:	Decision set aside,
	:	case remanded

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Beard Oil Company has appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated October 31, 1968, which affirmed as modified an Eastern States land office decision of June 4, 1968, cancelling the company's oil and gas lease BLM-A 059146. The land office decision indicated that a refund would be made of rentals paid from November 1, 1966. The Office of Appeals and Hearings modified by ruling that the rentals were payable and earned up to and including June 3, 1968.

Appellant's oil and gas lease was cancelled by the Bureau on the ground that prior-filed oil and gas lease offers BLM-A 057177 and BLM-A 057174 were the first qualified applications for the lands involved rather than appellant's offer and the lease was erroneously issued to appellant. The offerors of the conflicting offers filed protests on September 21, 1966, challenging the lease and the cancellation stemmed from these protests.

Appellant does not challenge the Bureau's action in cancelling its lease. Instead, it agrees with this action, but requests a refund for the total rental of $4,083.00 which represents annual rentals of $680.50 paid from the issuance of the lease effective November 1, 1962, through October 31, 1968. Repayment application Form 1822.1, December 1964, has been tendered by appellant.

Because no issue has been raised concerning the cancellation of appellant's lease and because of our conclusion, infra, concerning the rental refund, it is not necessary to discuss the merits of the lease cancellation or the difference between the amounts the land office and the Bureau's Appeals Office determined refundable. 1/

1/ However, see concurring opinion.

The primary question raised on appeal is whether this Department should order a refund of the rentals where a lease has been cancelled as having been issued erroneously in derogation of another's statutory preference right to the lease.

The decision below indicated that although the lease was voidable and subject to cancellation, the lessee had the quiet enjoyment of its leasehold and "was not deprived of any rights under the lease during the period for which it paid rental." It concluded that there was no authority in law or by regulation for excusing lessees from the obligation of paying rental pursuant to the terms of their leases, and thus there is no basis for a refund, citing L. N. Hagood, et al., 65 I.D. 405 (1958).

Appellant contends that the rentals should be refunded because the lease was issued erroneously. He says, quoting from pages 102 and 103, Oil and Gas Leasing on Federal Lands, by Lewis E. Hoffman (1st revision, 1957), that under a long standing practice of the Bureau, rentals have been refunded to oil and gas lessees in such circumstances.

The statutory authority for a refund is provided by section 204(a) of the Public Land Administration Act of July 14, 1960, 43 U.S.C. § 1374 (1964), as follows:

> In any case where it shall appear to the satisfaction of the Secretary of the Interior that any person has made a payment under any statute relating to the sale, entry, lease, use, or other disposition of the public lands which is not required, or is in excess of the amount required, by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

In L. N. Hagood, supra, this Department indicated that it was bound by a Comptroller General's opinion interpreting language in predecessor acts quite similar to the act of July 14, 1960. 2/ The Comptroller General in the opinion in L. N. Hagood, ruled that annual rentals on a noncompetitive oil and gas lease conflicting with an existing mining claim should not be refunded for any period up to the time the mining claim was determined to be valid and mineral patent issued. He ruled, however, that payments made thereafter would be in excess of the payments required by law and

2/ The prior statutes were repealed by the act of July 14, 1960, P. L. 86-649, § 204(b), 74 Stat. 507.

would be refundable. The rationale of the Comptroller's opinion in Hagood and of the decision below appears to be that until the United States actually parts with legal title or until the oil and gas lease is cancelled, rental payments are required by law and therefore no refund is authorized under the law. It is true that for the lease to be in good standing payment of rentals is required. Does this also mean that there is no difference between circumstances wherein a lease is in good standing and circumstances in which a lease must be cancelled because it was issued in error resulting from mistake of law or fact? If the Bureau erred in issuing the lease and cancellation is necessary to rectify the error, must it follow that lease rentals paid on the erroneously issued lease be considered as "required" within the meaning of the act of July 14, 1960? We think not, and changes arising since the Hagood case support this conclusion.

We point out that the Hagood matter did not rest with the departmental decision. A suit was filed in 1963 by the oil and gas lessees in that case against the United States for a refund of the rentals paid, Edwin Still et al. v. United States, Civil No. 7897, in the United States District Court for the District of Colorado. The case was settled with the United States making a compromise payment of a sizeable portion of the rentals that had been paid. Although the settlement establishes no authority, the fact that a refund of most of the rental was made lessens the weight of the Hagood decision as precedent. Furthermore, this Department and the Department of Justice in reaching the settlement relied on a decision of the United States District Court for the District of Colorado. In a case somewhat similar to the Hagood case, United States v. Ben L. Abbott, Civil No. 7326, that court on August 23, 1962, ruled that the defendant on his counterclaim was entitled to recover rentals paid for an oil and gas lease as to lands in conflict with mining claims. This ruling is contrary to the ruling of the Comptroller General in the Hagood case.

Since 1962, it appears that the Comptroller General has also taken a position contrary to the Hagood position. Its later ruling stems from factual circumstances in the departmental decision, Max Barash, The Texas Company, 63 I. D. 51 (1956), which was reversed by Barash v. Seaton, 256 F. 2d 714 (D.C. Cir. 1958), ordering the Secretary to issue a noncompetitive oil and gas lease to Barash. To comply, the Department was compelled to cancel a competitive lease which had been issued to the Texas Company. Max Barash, The Texas Company, 66 I.D. 11 (1959). In a subsequent decision which was cited below, Max Barash, The Texas Company, 66 I.D. 114 (1959), the Department held that the cancellation of Texas Company's oil and gas lease was not conditional upon but was independent of a refund of the rentals and other payments by Texas Company. On remand, the Bureau of Land Management referred the question of whether a refund could be paid Texas Company to the Comptroller General.

In an unpublished opinion dated May 31, 1961 (Comptroller General designation B-128712-O.M.) the Assistant Comptroller General indicated that the legislative history of section 204(a) of the Public Land Administration Act of July 14, 1960, supra, shows that the new provision was intended to grant more flexible authority to the Secretary to authorize repayments.

He concluded that:

> Since the effect of the court decisions in this instance was that the Secretary had no legal authority to execute . . . [the leases issued to the Texas Company], it is reasonable to conclude that he had no legal authority to exact the payments provided for thereunder. United States v. Ohio Oil Co., 163 F. 2d 633 [10th Cir. 1947], certiorari denied, [3] 33 U.S. 8[3] 3, [rehearing denied, 333 U.S. 865]. Accordingly, the claim of the Texas Company may be allowed in the full amount . . . .

While recognizing the factual distinctions between the instant case and the Hagood and Barash, Texas Company cases, we are of the opinion that the Secretary's authority to refund moneys paid under a lease which is cancelled is now clear. Holding that a payment required under law to maintain a lease in good standing may not be returned in these circumstances would ignore the effect of the cancellation of the lease upon any benefit the lessee may have derived from it prior to its cancellation. The court's action in United States v. Ben Abbott, involving the earlier, supplanted statutes, ordering a refund of the rentals negates the logic and fairness of such a holding. Also, the ruling of the Assistant Comptroller General quoted above under the act of July 14, 1960, refutes that reasoning and supports our conclusion that Congress did not intend the act of July 14, 1960, be interpreted restrictively so as to preclude the repayment of rentals where a lease must be cancelled as having been erroneously issued. Considering that the court's ruling in United States v. Ben Abbott, the enactment of the act of July 14, 1960, and the Assistant Comptroller General's opinion of May 31, 1961, have all transpired since the L. N. Hagood decision, we do not believe this Department need any longer consider itself bound to follow the Comptroller General's opinion quoted therein and that decision is overruled. Instead, we are of the opinion that the general practice of the Bureau of Land Management in refunding rentals where a lease has been erroneously issued is correct.

Although we conclude that there is authority under the act of July 14, 1960, to refund rentals where a lease must be cancelled as having been issued under a mistake of law or fact not due to any fault of the lessee, we do not imply that this Department will ignore the possibilities of fraud upon the Government. We do not intimate that a refund will be made if the cancellation of the oil and gas lease is due to some fault of the lessee himself or if he stands to benefit through any kind of an arrangement with parties seeking the cancellation of the lease. 3/

Exceptional care must be taken when ordering the cancellation of a lease, especially in circumstances such as this where the protests of the third parties were not made for more than 3 years after issuance of the lease, to assure that there was justification for delay and absence of collusion among the parties.

This case is returned to the Eastern States land office for further action on the lessee's application for repayment. However, before a refund is authorized by that office, the lessee must, at least, first furnish written proof under oath that there is no arrangement or agreement by it with any party concerning the cancellation of the lease. That office may also take such other action as is deemed necessary to assure that the lessee is in good faith and that there is no reason to believe that a conspiracy might exist between appellant and protestants.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is set aside and this case is remanded to the Eastern States land office of the Bureau of Land Management to refund the rentals paid by the appellant providing the conditions discussed above are satisfied.

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Francis E. Mayhue, Member

I concur: I concur:

_____ _____
Martin Ritvo, Member Edward Stuebing, Member

3/ The present regulations, 43 CFR subpart 1822, concerning repayments do not set forth any guide lines or safeguards concerning repayments and, indeed, fail to cite the act of July 14, 1960. This omission, however, does not preclude the Secretary, or his delegate, from granting the relief authorized by the statute or establishing guidelines.

CONCURRING OPINION

by

Edward W. Stuebing

Although in agreement with the majority opinion, I offer this separate concurring opinion for the purpose of touching on aspects of the matter not referred to elsewhere.

This case arises out of the fact that the land in question was posted for the filing of simultaneous oil and gas lease offers during the period from May 15, to May 22, 1961. Priority of consideration of offers so filed was determined by a subsequent drawing, at which one Huckaby's offer was first drawn. In accordance with the procedure then practiced, the other offers for the same land were then conditionally rejected pending adjudication of the Huckaby offer. However, Huckaby withdrew his offer on June 20, 1961, which should have signaled the reinstatement and adjudication of the next two offers in priority (BLM-A 057174 and BLM-A 057177; each for a different portion of the lands included in the Huckaby offer). Instead, the land office entertained the offer of Beard Oil Company (BLM-A 059146), to which the lease was issued October 15, 1962.

On September 21, 1966, a protest was filed by Theodore Baker, the offeror under BLM-A 057174 and this was followed on September 26, 1966, by a protest filed on behalf of Fred A. Gottseman and the Estate of Edwin W. Stockmeyer. These protests asserted the priority earned by the protestants in the drawing and urged the cancellation of the Beard Oil Company lease so that leases might issue to the protestants, whereupon the land office cancelled Beard's lease. Beard Oil Company appealed to the Director, but prior to perfecting its appeal it gave notice that it elected not to contest the cancellation of its lease provided that its rental payments were refunded. Because of this the cancellation was effected and leases covering the land were issued to the respective protestants, leaving only the issue of the rental refund to be resolved.

The easy acquiescence of the Bureau and the capitulation of Beard Oil Company form the crux of my concern. I am not at all sure that the cancellation of the Beard lease was enforceable at law. The protestants had slept on their rights until they suddenly appeared nearly four years after the lease was issued to Beard.

Beard might well have invoked a defense of laches, with what success we can now only speculate. While admitting the statutory right of the first qualified offeror to receive a lease, even a statutory right may be lost through the dilatory conduct of one who fails to assert it in good time. Laches, estoppel, limitation of action and finality of administrative decisions are examples of defenses employed to bar tardy claims, although they are not all applicable to this situation.

If Beard Oil Company had successfully defended its lease, we would not be faced with a question of repayment. Similarly, if it could be established that Beard simply yielded a right it was lawfully entitled to retain, no repayment would be due it. Where a lessee simply relinquishes his leasehold without any legal obligation to do so he is, not entitled to a refund. However, I cannot fault Beard Oil Company for accepting the Bureau's determination that the lease could not be preserved, since it was financially advantageous for it to do so. I merely wish to make the point that leases should not be cancelled at the behest of a third party where any doubt exists regarding the respective rights of the protestant and the lessee, since the effect of cancellation will be a loss to the government of accumulated rentals.

One further point should be considered. Even assuming that the cancellation of the lease was legally enforceable, during the years when Beard Oil Company held the lease it had certain rights. It might have treated the lease as an article of commerce and sold it to an innocent purchaser for value, thereby putting it beyond the reach of the protestants. It had the right to explore the leasehold and gain geological data which could have influenced its decision to consent to the cancellation rather than resist it. If the company had completed a producing well, the very fact of production would have been fatal to the non-competitive applications, and defeated any administrative cancellation of Beard's lease. There is nothing to suggest that the company had knowledge of the prior right of the protestants to receive the lease, but if it could be demonstrated that it took the lease with such knowledge for the purpose of exercising whatever rights the lease bestowed, then the company would have gotten what it bargained for and no refund would be due it.

For these reasons I suggest that extreme caution and thorough investigation of such cases is required in the future to protect the public interest.